APR 20 1885

IN THE

Supreme Court of the United States.

MORRIS RICHTER
vs.
JEROME *et al.*
No. 839.

MOTION FOR COMMISSION TO TAKE TESTIMONY *de bene esse.*

NOTE FOR THE RESPONDENTS.

The bill of complaint filed by Richter in the Circuit Court of the United States for the Western District of Michigan, in equity, having been demurred to, in respect to a matter going to the merits, the demurrer was sustained the bill dismissed, and an appeal from that decree is now pending in this Court, No. 839.

The complainant files his motion, supported by his affidavit for the issuing of a commission out of this Court, to take the testimony of four witnesses alleged to be aged and infirm, said testimony, when taken, not to be used in this Court but in the court below, provided the decree dismissing the bill is reversed.

Section 863, Revised Statutes, (act of 1789,) does not apply to a case like this, for the reason that there is no cause de-

pending in the District or Circuit Court of the United States, the whole case having been transferred by the appeal to this Court.

Keyser *vs.* Farr, 105 U. S., 265.

The 70th Rule of the Equity Practice of the Circuit Courts of the United States does not apply, because its purpose was to reach only the case where a bill had been filed and no answer had been made thereto. It also required that a bill should be pending in the circuit court, but as none is pending there in this case, and an issue has been made which has determined the result of the controversy, that rule does not meet this case.

The complainant does not, however, invoke, as it is understood, either the last-mentioned rule or the 863d Section Revised Statutes, but rests his motion upon the 917th section Revised Statutes, which gives to this court power to prescribe, from time to time, the forms of writs, process, pleadings and proceedings, and of taking and obtaining evidence, obtaining discovery, &c., and argues that the power to make the 70th rule implies the power to issue a commission in a particular case.

The answer seems obvious, to wit: That the purpose of the statute was to confer upon this Court the power to establish rules of practice, pleading and procedure of general application, and does not apply to matters of special relief in particular cases.

The jurisdiction to grant this motion, or the propriety of granting the same, does not find any support in the fact that in original causes and in appeals in admiralty pending in this Court it is competent to take additional proofs and even frame a new issue, or that in any cause pending in this court there is power and jurisdiction, even after judgment, to take testimony that becomes necessary for the proper determination of any question subsequently arising in this Court, such cases as are provided for by the 12th rule. It is "further proof" which is referred to. In this

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case no proof has been taken, nor is any needed in this Court.

It is believed that this Court has never exercised the power invoked by this petition—at least, we are unable to find any instances reported; but we are informed that in one case where there was doubt as to the sufficiency of an appeal bond, testimony was ordered to be taken, and that in another instance where, after judgment had been rendered in this Court, a suggestion having been made that the suit was begun and prosecuted collusively, testimony was ordered to be taken for the purpose of ascertaining the truth of the suggestion, but no case has been found similar to this.

If the complainant, however, is in a position to entitle him to have the testimony *de bene esse* taken, he is not without a well known and adequate remedy. That remedy is by filing an original bill to perpetuate testimony, a perfectly convenient and well known method of procedure.

2d Story's Eq. Jurisprudence, sec. 1505 *et seq.*

And if the Circuit Court for the Western District of Michigan had jurisdiction in the original suit between Morris Richter and the defendants therein, it has jurisdiction between the same parties over a bill to perpetuate testimony, as the subject matter of the suit is land situated in that district.

18 Statutes at Large, 470, sec. 8.

But the petition does not show such a state of facts as is required to take testimony *de bene esse.*

There is no evidence of infirmity of the witnesses, or any statement of it. The age given does not make them "aged or infirm."

There is no evidence of the age of the witnesses, except the belief of the informant of the party of a fact which, if true, could be easily proved.

There is no evidence that either of the witnesses is a sole witness of a single material fact.

The affidavit and petition show that the witnesses are all called, as far as disclosed, to prove the same facts, and there is no disclosure of a material fact known to a single witness only.

The affidavit alleges that Francis W. Anthony *assisted* in putting on the market $1,300,000 of bonds purporting to be secured by 200,000 acres of land, when the Company had the legal title to 47,000 acres and only an equitable title to 153,000.

That Anthony received the money on the bonds from *bona fide* purchasers, who bought on a representation of a legal title in the 153,000 acres, and then colluded with James C. Ayer to procure from the State of Michigan title to the same 153,000 acres.

The affidavit alleges that William L. Avery is a witness to the proceedings of the directors of the L. S. S. C. R. & I. Co. in putting the bonds on the market, and in making the representation as to the title, and as a director knows all of the acts of the directors, Ayer and other defendants, to bring the canal and railroad enterprise to a conclusion.

The affidavit also states that Ayer had the same knowledge as Anthony.

The affidavit represents Samuel L. Smith as a witness to a single material fact, and states the material testimony of Smith to be that Ayer procured the legal title of the 153,000 acres with full knowledge that it was only an equitable title. Smith's testimony is to prove the same fact as Anthony and Avery, Smith being a party to the same transaction.

Alfred Russell is expected to prove the same facts, excepting that he obtained his knowledge as counsel for Ayer, and, therefore, could not disclose.

The four witnesses are stated by the plaintiff as all having knowledge of the transaction described in the bill. Smith and Anthony knew it because they were active parties to the transaction. Avery knew it because he was a director of the company, and Russell knew it only as counsel.

The affidavit of Manning, in opposition to the motion,

states that he is personally acquainted with the said four witnesses. "They are all men of activity and energy, and engaged in the daily prosecution of their business. They all appear to have good and vigorous health and to be in the full possession and enjoyment of all their mental and bodily faculties and in no respect infirm." * * * That Anthony is not over sixty years of age, Avery not more than sixty-five, Smith and Russell not over fifty-five. That they all reside in the State of Michigan, "and on or near the line of railroad which runs to the place of trial."

It is submitted that no jurisdiction, power or authority is shown or exists for granting the relief asked for.

That the issuing of such a commission is not within or according to the established rules and practice of this court.

That the showing of the petition and affidavit does not exhibit a case in which such commission ought to be issued, or the existence of any necessity therefor.

That if the facts warrant the taking of the testimony of the persons named as witnesses, adequate relief is given under the familiar practice of filing an independent bill to perpetuate testimony.

H. H. WELLS,

Solicitor and Counsel in opposition to the motion.